

New regulation provides for witnessing court documents, including affidavits, by audio visual link

On 22 April 2020, the [Electronic Transactions Amendment \(COVID-19 Witnessing of Documents\) Regulation 2020](#) ("Witnessing of Documents Regulation") commenced and introduced processes for witnessing the signing of documents by audio visual link ("AVL"), during the COVID-19 pandemic.

KEY POINTS

The *Witnessing of Documents Regulation* amends the [Electronic Transactions Regulation 2017](#) ("ET Regulation") and introduces three important processes relevant to court documents. These changes permit:

- ▶ Use of AVL to witness a person signing documents in real time, including affidavits with annexures or exhibits, as well as statutory declarations: cls 1, 2 of Sch. 1;
- ▶ Satisfying specific witnessing requirements by AVL, such as verifying the signatory's identity, swearing or affirming the contents of an affidavit and "seeing the face of the signatory": cl. 2(4) of Sch. 1; and
- ▶ A document that is an oath, declaration or affidavit being taken or made before an Australian legal practitioner, for the purposes identified in s. 26 of the [Oaths Act 1900](#) ("Oaths Act"), as if they are a justice of the peace: cl. 3 of Sch. 1.

As noted in our alert of 8 April 2020, in general, when witnessing a person signing a court document, the witness has been required to be physically present with a signatory and able to immediately sign to verify their role as witness. However, in light of the COVID-19 pandemic and the need for social distancing, difficulties witnessing court documents in person have been recognised.

The *Witnessing of Documents Regulation* is made under the [Electronic Transactions Act 2000](#) ("ET Act"), including the regulation making power provided in s.17, which was recently added by emergency legislation.

When preparing to witness court documents, it is important to read carefully the newly inserted cl. 8A and Sch. 1 to the *ET Regulation*. It remains important to also consider the particular jurisdiction and document in question to identify specific requirements that may continue to apply. By way of guidance, it should be noted that:

- Where a law requires the signature of a person to be witnessed, this can be conducted by AVL. Specific arrangements to witness a signature on documents may also be performed by AVL: cl. 2(1)(a)-(b) of Sch.1.
- For remote witnessing to be conducted, the technology must enable "continuous and contemporaneous audio and visual communication between persons at different places": cl. 1 of Sch. 1.
- When witnessing documents by AVL, attention must be given to the four mandatory steps set out in cl. 2(2) of Sch. 1.
- In general, when signing a document with a witness via AVL, the key steps to take include:
 - a) The signatory and witness confer continuously by AVL throughout the signing and witnessing process: cls 1-2 of Sch. 1. This will satisfy a requirement for a witness to be present with a signatory: cl. 2(4)(b) of Sch.1;
 - b) The witness can fulfil a requirement to confirm or verify the identity of the signatory via AVL: cl. 2(4)(a)(ii) of Sch. 1;
 - c) The witness can fulfil a requirement to see the face of the signatory (a specific requirement for affidavits under s.34 *Oaths Act*): cl. 2(4)(a)(v) of Sch. 1;
 - d) In the case of an affidavit, the swearing or affirming of the contents of the document before the witness (if an authorised witness under ss. 26 or 27 of the *Oaths Act 1900*): cl. 2(4)(a)(iv) of Sch. 1;
 - e) The signatory must sign the document with the witness observing in real time: cl. 2(2)(a) of Sch. 1. Signing continues, in general, to mean a paper document with an ink signature. The new regulation does *not* introduce the use of electronic signatures where they are not already authorised;

- f) Before a witness also signs the document, they must be reasonably satisfied it is the same or a copy of the document signed by the signatory: cl. 2(2)(c) of Sch. 1;
- g) The witness must attest or confirm they witnessed the signing of the document, by also signing the document or a copy: cl.2(2)(b) of Sch. 1;
- h) The witness must endorse, that is, write on the document or the copy, that they have witnessed the signature on the document in accordance with the *ET Regulation* and specify the method used to witness the signature: cls 2(2)(d) and (3) of Sch. 1. For example:

*"I have signed [a counterpart of the document **OR** a scanned copy of the signed document sent to me electronically by the signatory], having witnessed the signature over audio visual link in accordance with clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017."*

- i) The witness can also certify the performance of other steps required by an Act or another law: cl. 2(4)(a)(i) of Sch. 1.
- It should be noted that these measures for remote witnessing are temporary. They will expire in accordance with ss. 17 and 18 of the *ET Act*.

Consider seeking advice if the witnessing requirements for court documents are not clear in a particular case.

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